



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 227 and 252

[Docket DARS-2019-0048]

RIN 0750-AK71

Defense Federal Acquisition Regulation Supplement: Validation of Proprietary and Technical Data (DFARS Case 2018-D069)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: DoD is seeking information that will assist in the development of a revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019, which amended the statutory presumption of development exclusively at private expense for commercial items in the procedures governing the validation of asserted restrictions on technical data.

DATES: Interested parties should submit written comments to the address shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, to be considered in the formation of any proposed rule.

DoD is also hosting public meetings to obtain the views of interested parties in accordance with the notice published in the *Federal Register* on August 16, 2019, at 84 FR 41953.

ADDRESSES: Submit written comments identified by DFARS Case 2018-D069, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2018-D069." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D069" on any attached documents.
- o *Email:* osd.dfars@mail.mil. Include DFARS Case 2018-D069 in the subject line of the message.
- o *Fax:* 571-372-6094.
- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(A-S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571-372-6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is seeking information from experts and interested parties in Government and the private sector that will assist in the development of a revision to the DFARS to implement section 865 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). Section 865 repeals several years of congressional adjustments to the statutory presumption of development at private expense for commercial items in the validation procedures at paragraph (f) of 10 U.S.C. 2321.

The presumption of development funding for commercial items was established in 1994 by section 8106 of the Federal Acquisition Streamlining Act (FASA) (Pub. L. 103-355). This statutory presumption has been amended numerous times, including by section 802(b) of the NDAA for FY 2007 (Pub. L. 109-364), section 815(a)(2) of the NDAA for FY 2008 (Pub. L. 110-181), section 1071(a)(5) of the NDAA for FY 2015 (Pub. L. 113-291), section 813(a) of the NDAA for FY 2016 (Pub. L. 114-92), and most recently by section 865.

The DFARS implementation of this mandatory presumption has evolved accordingly to track the statutory changes, with the primary coverage found at paragraph (c) of DFARS section 227.7103-13, and paragraph (b) of the clause at DFARS 252.227-7037. There is no DFARS coverage applying such a presumption of development funding to commercial computer software because, as

a matter of policy also dating back to the FASA time frame, the underlying procedures for challenging and validating asserted restrictions have not been applied to commercial computer software - only to noncommercial computer software (e.g., DFARS section 227.7203-13 and the clause at DFARS 252.227-7019).

II. Discussion and Analysis

Section 865 repeals the amendments to 10 U.S.C. 2321(f) made by the NDAA's for FYs 2007 through 2016, which required that contractors take certain steps to demonstrate that they paid for the development of commercial items if their restrictions on technical data are challenged. Section 865 returns the presumption of development funding for commercial items to its original form, as established in 1994 by FASA. More specifically, FASA provided that when challenging asserted restrictions on technical data pertaining to a commercial item, DoD is required to presume that the contractor or subcontractor has justified the asserted restriction on the basis that the item was developed exclusively at private expense, regardless of whether the contractor or subcontractor submits a justification in response to the challenge notice. The challenge may be sustained only if DoD provides information demonstrating that the item was not developed exclusively at private expense. Section 865 restores this paradigm.

Therefore, DoD is considering changes that would return the DFARS coverage at 227.7103-13 and 252.227-7037 substantially back to its original FASA-implementing language with regard to the presumption. The changes would incorporate minor wording differences due to slight changes in style and nomenclature over the years, such as referring to "the Contracting Officer" in lieu of "the Department."

In addition to seeking public comment on the substance of the draft DFARS revisions, DoD is also seeking information regarding any corresponding change in the burden, including associated costs or savings, resulting from contractors and subcontractors complying with the draft revised DFARS implementation. More specifically, DoD is seeking information regarding any anticipated increase or decrease in such burden and costs relative to the burden and costs associated with complying with the current DFARS implementing language.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 227 and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 227 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 227—PATENTS, DATA, AND COPYRIGHTS

2. Amend section 227.7103-13 by revising paragraph (c) (2) to read as follows:

227.7103-13 Government right to review, verify, challenge, and validate asserted restrictions.

* * * * *

(c) * * *

(2) *Commercial items—presumption regarding development exclusively at private expense.* 10 U.S.C. 2320(b) (1) and 2321(f) establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial items—on the basis of development exclusively at private expense. Contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. When a challenge is warranted for a commercial item, a contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend section 252.227-7037 by—

- a. In the clause heading, removing “(SEP 2016)” and adding “(DATE)” in its place;
- b. Revising paragraph (b); and
- c. In paragraph (c), removing “paragraph (b) (1)” and adding “paragraph (b)” in its place.

The revision reads as follows:

252.227-7037 Validation of Restrictive Markings on Technical Data.

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(b) *Commercial items—presumption regarding development exclusively at private expense.* The Contracting Officer will presume that the Contractor’s or a subcontractor’s asserted use or release restrictions with respect to a commercial item is justified on the basis that the item was developed exclusively at private expense. The Contracting Officer will not challenge such assertions unless the Contracting Officer has information that demonstrates that the commercial item was not developed exclusively at private expense.

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